COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

WORCESTER COUNTY NO. 2016-P-1115

COMMONWEALTH

V.

MARC R. ALDANA

BRIEF FOR THE APPELLANT ON APPEAL FROM THE WORCESTER DIVISION OF THE SUPERIOR COURT DEPARTMENT

ETHAN C. STILES

ATTORNEY FOR DEFENDANT

P.O. BOX 232
PLYMPTON, MA 02367
ecstileslaw@gmail.com
Tel : (781) 312-7520
BBO #661083

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ISSUES PRESENTED

1. Before the police can knock down an arrestee's door, they are required to knock, announce themselves and state their purpose. When the police merely announced "police", then proceeded to break down the defendant's door and their purpose was not obviously apparent, should the results of any search be suppressed? Additionally, when police officers arrest a defendant within his apartment, their authority to search is limited to his person and contraband in plain view. Here, after the officers arrested the defendant in his apartment on a warrant for assault and battery, they stayed to investigate chemicals and a brown substance in his kitchen. Where the officers conducted their search without a warrant and the nature and purpose of the chemicals was not immediately obvious, did this violate the Constitutional requirement for the officers to obtain a warrant prior to searching the apartment?

2. The defendant was convicted of possessing substances, aluminum powder and red iron oxide, with the intent to make an incendiary substance, thermite, without lawful authority. Where he purchased the

substances legally, the thermite to be made with them has legitimate uses and the Commonwealth failed to introduce the applicable regulatory authority he had to follow in order to legally possess thermite, should his convictions stand?

3. The defendant was convicted of two counts of possessing substances with the intent to make an incendiary substance. Are the convictions duplicative when the items were found in one place at one time, the penalties for possession of the substances would in most cases equal or exceed the penalty for possession of the completed incendiary substance, the Commonwealth was only able to show that the defendant had the intent to make one incendiary substance and the statute does not explicitly provide for a separate conviction for each item?

STATEMENT OF THE CASE

On December 20, 2013, a Grand Jury convened in the Worcester Division of the Superior Court Department returned three indictments in 1385CR01378 against the defendant, Marc R. Aldana, the first for possession of an explosive or incendiary device, G. L. c. 266, § 102(c) and the second and third indictments for

possession of a substance or material or ingredient which alone or in combination could make an incendiary device or substance with the intent to make an incendiary device, G. L. c. 266, § 102(a). The defendant filed a motion to dismiss, which was denied on August 15, 2014 (Lemire, J.) The defendant filed a motion to suppress for which the court held an evidentiary hearing on the motion on December 15, 2014. The court denied the motion to suppress by was of a memorandum dated for January 30, 2015.

The court tried these charges in a jury-waived trial from January 6-8, 2016 (Tucker, J. presiding) and the judge found Mr. Aldana not guilty of possessing an incendiary device but guilty of the two ingredient charges. The court sentenced Mr. Aldana on January 8, 2016 to twenty months in the House of Correction. Mr. Aldana filed a notice of appeal on January 12, 2016, and this Court entered this case on its docket on August 11, 2016.

STATEMENT OF THE FACTS

1. Facts Developed at the Suppression Hearing

On October 15, 2013, officers from the Worcester Police Department had two District Court warrants to

arrest Mr. Aldana. TM/12[1]. The first warrant was for assault and battery on a police officer, whom Mr. Aldana had allegedly tried to run over with his car and the second warrant was a default warrant on a disorderly person charge. TM/13, 15, 28, 44. They also had a tip that he was involved in several armed robberies in Worcester and in surrounding towns involving a firearm. TM/45-6, 72.

They determined that he was possibly living in apartment number four of a building located at 49 Pleasant Street in Worcester and went there to try to arrest him at 10:35A.M. on October 15. TM/16-7, 26, 47. They spoke to the building's maintenance man and learned that Mr. Aldana was present in his apartment. TM/18-9. They knocked on the door twice, announced themselves as the Worcester police, but when they heard no response they kicked in the door. TM/19-21.

The door did not yield immediately to the force applied to it, and while kicking in the door one officer heard somebody inside and glass breaking. TM/21, 68. The officers had previously determined

1 In this brief, the transcript of motion to suppress hearing will be designated as TM/##, the trial transcripts will be designated by day as T#/## and the record appendix will be designated as R.##.

there was no other way he could have left the apartment. TM/19. After quite a few kicks, the door was able to be opened but there were several tires and possibly a pair of chairs behind the door which the police had to push by. TM/22, 49. When they entered they saw Mr. Aldana and took him into custody right away. TM/23. Mr. Aldana was cooperative, placed in handcuffs and transported from the scene. TM/24.

The apartment, which was approximately fifteen feet long had an open floor plan, except for a bedroom and a bathroom. TM/37, 40, 64. From the entrance door, the apartment opens up into the living room area after a short corridor and the kitchen is off to the left of the living room past the bathroom. R. 14-37. Mr. Aldana had been arrested near the kitchen area and officers noticed a brownish-red powdery substance all over the kitchen and near the doorway which concerned them. TM/24, 39, 55, R. 19-26. The substance was also smeared onto the frame of a broken kitchen window and there was a rope ladder near the window. TM/51, 55. There was a bag of brown-red powder on the counter near the window and a pair of aluminum foil bags. TM/51. R. 21. When the supervising sergeant went into to the

kitchen, he could read the labels on the bags. TM/51, 79. One bag was labeled "aluminum powder" the other was labeled "red iron oxide". TM/51, R. 24, 32.

The sergeant was suspicious of the labels on the bags, which meant nothing to him. TM/51, 67. A detective from the Holden Police Department, who was interested in Mr. Aldana for armed robberies, arrived at the scene and looked up the names of the labels on his Internet-enabled phone and found out that red iron oxide and aluminum powder could be used to make thermite. TM/51. The Holden detective learned that thermite was a chemical that burned at a high intensity heat, could be explosive, unstable if not used by professionals and not something that is stored in a kitchen or an apartment building. TM/75-6. He did not recall reading that thermite requires a really high heat source to ignite. TM/81. No officer looked inside the labeled bags at this time. TM/81.

This information was new to the officers on the scene and they called the State Police, the fire department and officers trained to respond to bomb situations. TM/52-3, 6. The bags were removed from the apartment, tested and destroyed. TM/53, R. 38-60.

A sweep through the apartment found nothing else of concern. TM/53, 68. There was no high intensity heat source found in the apartment. TM/79. At no time was a search warrant issued for any items inside Mr. Aldana's apartment.

Mr. Aldana called the building manager twice to report that his apartment had broken into. TM/88-89. Once, the front door was broken, the other time a person broke through the window. TM/89. Mr. Aldana had spoken to the building manager after the second breakin regarding his security, but all the building manager could do was to maintain the common areas to the apartment building. TM/90. The building manager knew that the door was repaired or replaced at some point around October, 2013. TM/95. Mr. Aldana was the only person on the lease as a tenant for Apartment Four. TM/91.

2. <u>The Properties of Thermite</u>

Thermite is a two-component pyrotechnic mixture of a fuel, aluminum powder, and an oxidizer, red iron oxide, which burns at over 4,000 degrees when ignited. T2/11, 126, 145, 154. Red iron oxide is also known as rust and the aluminum is finely ground. T2/15, 134,

139. The red iron oxide provides all the oxygen needed for the aluminum to burn, the reaction does not require air. T2/16. The ideal mixture is from 66 to 75 percent red iron oxide to 25 to 33 percent aluminum powder. T2/101, 128. No other chemicals or substances or special equipment is required to create thermite and recipes can be found both in reference works and on the Internet. T2/108, 154.

It is difficult to ignite thermite because it requires a high heat source of in excess of 2,000 degrees. T2/107. It can be ignited by a high heat source like a road flare, a magnesium strip or a sparkler. T2/107-8. It cannot be ignited by a match, a cigarette lighter or even a Bunsen burner. T2/110, 136. Red iron oxide and aluminum powder do not ignite own their own or in proximity to each other, they require intimate contact between the particles. T2/53, 95, 100. The only purpose which can be achieved by combining red iron oxide and aluminum powder is thermite. T2/138. Without a high heat source, thermite is a very stable substance. T2/46.

Thermite burns but does not explode. T2/7. Once thermite starts to burn, it burns too hotly to be

extinguished by water. T2/16. Water will steam on contact and can create steam explosions which can cause the combustible material to spread. T1/168. There will be molten metal from the thermite reaction which will cool into a metal slag. T2/25, 34. When the police ignited the bags seized from Mr. Aldana's apartment, they burned consistently with their experience of how thermite burns and left a metal slag behind. T2/33, 39. They did not find any pipes or lead containers in which the thermite could be placed to become a device. T1/147.

Military personnel use thermite to destroy equipment and vehicles that they do not want to fall into the hands of the enemy. T2/7. It can be used by civilians for welding in the rail industry using the metal slag byproduct. T2/25. The heat produced from thermite is hot enough to melt and cut through metal. T2/124. Because water will not extinguish ignited thermite, it can be used for underwater welding. T2/59-60.

3. The Permitting Scheme

Both red iron oxide and aluminum powder can be legally sold and in this case were distributed in

silver labeled bags from Alpha Chemicals. T1/173, R. 24, 32. Although an inhalation hazard, a permit is only required to possess these substances only in a certain quantity. T1/183.

According to Worcester Fire Lieutenant Robert Mansfield, the permitting for incendiary substances is governed by G. L. c. 148, §§ 9, 12, 13 and 527 Code. Mass. Regs. § 13. T1/178. At the Commonwealth's request, the trial judge took judicial notice of these statutes and the regulation. T1/17, 179-81. G. L. c. 148, § 9 governs the storage, handling and containment of materials for fire prevention but does not specify specific materials. T1/178. 527 Code Mass. Regs. § 13 was specific for explosives and explosive materials. T1/179. G. L. c. 148, § 12 deals with licensing the sale and manufacture of fireworks and § 13 deals with the storage in buildings and structures. T1/180.

Lt. Mansfield indicated that Mr. Aldana would need to be a licensed handler or blaster to apply for a permit. T1/181. The City of Worcester handles the licensing for the storage and transportation of materials while the state issues blasting permits. T1/181-2. Lt. Mansfield could find no relevant permits

issued Mr. Aldana or related to the apartment building at 49 Pleasant Street. T1/182. He indicated that 527 Code Mass. Regs. § 13 includes thermite by reference to 27 Code Fed. Regs. § 555.23. T1/185. 527 Code. Mass. Regs. § 13 does not apply to pyrotechnics such as flares, fuses and fireworks, but they are still permitted through the fire department. T1/186.

ARGUMENT

I. THE DEFENDANT'S MOTION TO SUPPRESS SHOULD HAVE BEEN ALLOWED BECAUSE THE POLICE DID NOT ANNOUNCE THEIR PRESENCE AND THE NATURE OF THE ITEMS IN PLAIN VIEW WAS NOT IMMEDIATELY APPARENT

A. Failure to state the purpose of the entry

"Before attempting forcibly to enter a private dwelling to execute a warrant, police must knock, announce their identity, and state their purpose, unless the circumstances justify dispensing with one or all of these requirements." Commonwealth v. Antwine, 417 Mass. 637, 638 (1994). This long-standing common-law rule is intended to decrease the potential for violence, protect privacy and prevent unnecessary damage to homes. Commonwealth v. Cundriff, 382 Mass. 137, 146 (1980). In cases where there is probable cause that knocking and announcing would have

endangered the officers, a judge may authorize them to dispense with the knock and announce requirement. Id. at 147-8. A magistrate may also dispense with the requirement in a search warrant where there is a risk that evidence could quickly and easily be destroyed if the police were to give a suspect advance warning. Commonwealth v. Scalise, 387 Mass. 413, 422-23 (1982). Similarly, the likelihood of a suspect's escape may also necessitate an entry without notice. Id. at 418. Finally, if there are facts known to the police that the suspect is virtually certain to know of the police's purpose, the courts will not require the "useless gesture" of an announcement. Antwine, 417 Mass at 639.

As in Antwine, Id. at 638, the police here knocked and stated "police" but did not announce the reason why they wanted Mr. Aldana to open their door to them. Unlike the three default warrants in Antwine, Id. at 641, there was only a single default warrant against Mr. Aldana and the police entered in the middle of the morning, not the middle of the night. His failure to appear in court in for a misdemeanor disorderly conduct charge, resulting in the default warrant, would not

necessarily convey to him that he was a wanted and hunted fugitive from justice. Contrast Id. There was no demonstration that Mr. Aldana was aware of the warrant for assault and battery on a police officer issued for him that morning prior to the announcement of police at his door. It was vigorously argued in the motion to suppress that the facts, namely that Mr. Aldana sped away from the officer at a traffic stop and a portion of his vehicle struck the officer's hand, were insufficient to give rise to that complaint. TM/104. A corollary to that argument is that those facts would not necessarily put him on notice that he was being sought after for a felony. Ultimately, the nature of the police's visit would not have been "virtually certain" to Mr. Aldana. Had the police have said "a few more words", the state the purpose requirement would have been met. See Miller v. U.S., 357 U.S. 301, 309-10 (1958) (suppressing evidence because police failed to inform individual who cracked open his door in response to their knock that they were there to arrest him before they ripped the door out to get to him).

The police had already determined that there was no other way out of the apartment. The police were not searching for evidence, they were searching for him. Despite the tip that Mr. Aldana may have been involved in armed robberies with a firearm and had been charged with assault and battery on a police officer, they did not consider themselves sufficiently at risk to seek a no-knock warrant from a judge. Scalise, 387 Mass. at 420. Mr. Aldana's failure to open the door did not give the police authorization after-the-fact to dispense with the statement of purpose requirement. Commonwealth v. Jimenez, 438 Mass. 213, 217 (2002).

The announcement requirement would have served an additional important purpose in this case, to notify Mr. Aldana that the real police were at his door. Mr. Aldana's apartment door did not have a window or a peep hole, so he could not see a uniformed presence to reassure him that it was safe to open the door. R. 14. While anyone can bark "police" in the hopes that the word will open the door, the announcement of a purpose with a valid connection to Mr. Aldana would have informed him that it was likely that the genuine article was outside his apartment door. See

Commonwealth v. Labare, 11 Mass. App. Ct. 370 (1981) (recognizing constructive breaking and entering into a dwelling, such as by means of an impersonation or trick, has long been recognized in Massachusetts). Moreover, Mr. Aldana's apartment had already been broken into twice prior to October 15, 2013, he had expressed concerns over his safety and security to the building manager and the manager was not certain when the door had been fixed. T1/89. Even though there may have been glass breaking in response to the police kicking down the door, given the unreasonable conduct which preceded it, it did not give the police probable cause to believe that the defendant was trying to evade arrest or was destroying some unknown contraband.

B. Lack of immediately apparent nature of the items in plain view

Police officers may seize "article[s] of incriminating character" where they have a right to be present. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). The nexus of the item to criminal activity must be immediately apparent, such as contraband or fruits of crime, or plausibly related to proof of criminal activity of which they were already aware.

Commonwealth v. Bond, 375 Mass. 201, 207 (1978). Entry into a residence to serve an arrest warrant will give the police authority to seize items that are clearly visible from where they may be permitted. Commonwealth v. Franco, 419 Mass. 635, 639-40 (1995). The police are not immediately required to leave if they perceive suspected items of contraband in plain view. Commonwealth v. Brown, 32 Mass. App. Ct. 649, 652-53 (1992).

The courts have recognized that certain items, such as guns, are presumptively contraband. Commonwealth v. Little, 16 Mass. App. Ct. 959, 960 (1983). The qualities of controlled substances like cocaine are so well-known to police officers that their incriminating nature is often immediately apparent. Commonwealth v. Santana, 420 Mass. 205, 211-12 (1995). In other situations, the courts have upheld seizures and field tests of items and substances that show strong indications of containing contraband. In Commonwealth v. Varney, 391 Mass. 34, 42 (1984), the SJC approved a search of glassine bags with white powder found inside a suspicious package. Similarly, in Brown, the police were allowed to seize and test an

aluminum foil covered ball and a quantity of white powder found in a newspaper near a pair of marijuana roaches. Finally, the police were allowed to test a white, pasty substance in a kitchen sink while executing an arrest warrant when the agents smelled a strong odor acetone and knew that acetone was used to reprocess cocaine. Franco, 419 Mass. at 638.

However, even though an item in plain view may conceivably relate to criminal activity, that does not give the police carte blanche to seize and test. In Commonwealth v. Accaputo, 380 Mass. 435, 450 (1980), the SJC ruled that the police overstepped their authority in a raid on a suspicious drugstore when the officers began to seize drugs on the pharmacy's shelves. In Commonwealth v. Sliech-Brodeur, 457 Mass. 300, 308-09 (2010), the SJC held that the incriminating nature of a letter was not immediately apparent even though the police officer was able to view certain phrases in it which had meaning to his investigation. Finally in Commonwealth v. White, 469 Mass. 96, 102 (2014) the Court held that it was not immediately apparent that pills in an unlabeled prescription pill container seized from the defendant, who was arrested

on an arrest warrant, were contraband until the police officer performed an Internet search using the markings on the pills.

The line of cases culminating in White should have required the seizure of the chemicals in this case. Mr. Aldana was arrested on a default warrant, the police had no idea he was in possession of component substances that could be combined to create an incendiary substance. Nor did they have any idea of what the substances could be used for until they looked up the combination on the Internet. The labels on the bags, "aluminum powder" and "red iron oxide", do not suggest any particular danger or contraband purpose, and in and of themselves are not contraband. T1/183. The bags were labeled with a legitimate label and these substances can be freely purchased online.[2] The police's authority to search would not have allowed them to exclude every other use for the substances other than making thermite. That the substance in the unlabeled bag could possibly be thermite is not

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2 The distributor, Alpha Chemicals, has a website for direct purchases, http://alphachemicals.com/, but these items can also be found at general retailers like Amazon.com.

sufficient to justify the seizure and testing on the basis of the plain view doctrine.

II. THE COMMONWEALTH FAILED TO SHOW WHAT REGULATORY SCHEME THE DEFENDANT HAD TO ADHERE TO WHEN THERE WERE LEGITIMATE USES FOR THE THERMITE HE INTENDED TO MAKE

Mr. Aldana was found guilty of violating the two counts of the indictment charging him with violating G. L. c. 266, § 102(a). The trial judge found that he had possessed aluminum powder and red iron oxide with the intent to mix them to make thermite, an incendiary compound. G. L. c. 266, § 102(a)(i) punishes :

> (a) Whoever, without lawful authority, has in his possession or under his control:
>
> > (i) any substance, material, article, explosive or ingredient which, alone or in combination, could be used to make a destructive or incendiary device or substance and who intends to make a destructive or incendiary device or substance;

In this case, the statute requires the Commonwealth to prove beyond a reasonable doubt that Mr. Aldana was without lawful authority to possess the aluminum powder and red iron oxide when he had the intent to make thermite. Commonwealth v. Cabral, 443 Mass. 171, 179-80 (2005). G. L. c. 266, § 102(a) & (d)[3] are worded very broadly, by its wording the

3 Mr. Aldana was found not guilty of the charge under

possession of ordinary substances like gasoline, propane and alcohol and common household items like acetone and cooking oil could be criminalized because they are all incendiary substances. Compare Commonwealth v. Bushway, 7 Mass. App. Ct. 715, 718-19 & n. 4 (1979) (jury could, but not compelled to, find illicit purpose in gasoline filled bags under circumstances of case). The without lawful authority language guards against irrational and arbitrary applications of the statute. The expert witnesses agreed that thermite had constructive, legitimate commercial uses in addition to its destructive uses. Contrast Commonwealth v. Lombardo, 23 Mass. App. Ct. 1006, 1007-08 (1987) (cigarette package filled with gunpowder and disguised to appear harmless could not reasonably be regarded as having any innocent use). The MBTA regularly uses thermite welding to repair track. See Massachusetts Bay Transportation Authority, Railroad Operations Commuter Rail Material Specifications, November 1992 at 50-51; Massachusetts Bay Transportation Authority, Track Maintenance and Safety Standards: Blue, Orange and Red Lines, 2005 at

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subsection (d).

27. It was thus incumbent on the Commonwealth to show that thermite was a substance which the defendant could possess legally only through a permit.

In order to meet its burden, the Commonwealth introduced and requested that the trial judge take judicial notice of G. L. c. 148, § 9, 12 & 13 and 527 Code Mass. Regs. § 13 to meet its burden on this element. T1/179-181. G. L. c. 148, § 9 gives the Board of Fire Prevention Regulations the authority to make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or disposition of, among other things, explosive or inflammable fluids or compounds. 527 Code Mass. Regs. § 13.01(1) applies to "the manufacture, mixing, transportation, storage, sale and use of explosives and explosive material." "Explosive" is "any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion; i.e., with substantially instantaneous release of gas and heat." Id. Explosive material is "any explosive, blasting agent or detonator". Id.

As established by the testimony of the Commonwealth and defendant's experts, thermite is

intended to function, not an explosive device or substance like small arms ammunition, black powder, blasting caps or C-4 but as an incendiary or pyrotechnic substance. T2/7, 98. Lt. Mansfield had to concede that 527 Code Mass. Regs. § 13.00 only applied to explosive compounds, not incendiary or pyrotechnic compounds. Specifically, 527 Code Mass. Regs. § 13.01(2)(d) indicates that it does not apply to "pyrotechnics such as flares, fuses, railway torpedoes". Moreover, the only time the word "incendiary" and the only other time the word "pyrotechnic" is used is when the regulation excludes "bursting charges or incendiary . . . or pyrotechnic projectiles" from the definition of "small arms ammunition." 527 Code Mass. Regs. § 13.03.

Moreover, Lt. Mansfield was incorrect that thermite is among the substances identified in 27 Code Fed. Regs. § 555.23. 527 Code Mass. Regs. § 13.03 includes in its definition of "explosive material" "any material determined to be contained in the list of explosive materials provided for in 27 CFR 55.23." 27 Code Fed. Regs. § 555.23 requires the Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives

to publish a list of explosive materials at least annually in the Federal Register. "Explosive materials" is defined in 27 Code Fed. Regs. § 555.11 as "explosives, blasting agents, water gels, . . . detonators [and] all items 'in the List of Explosive Materials' provided for in § 555.23." The list was published in the Federal Register on September 20, 2012, Vol. 77. No. 183 and again on October 28, 2013, Vol. 78, No. 208. Neither list includes thermite or any substance which can be obviously identified as thermite. See Commonwealth v. Ferola, 72 Mass. App. Ct. 170, 174 (2008) (reversing conviction for operating under influence of narcotics when no proof was offered at trial that Klonopin was a substance identified as a controlled substance in Code of Federal Regulations). The Commonwealth did not introduce or ask the judge to take notice of any of the federal regulations or publications.

As indicated by the testimony of the experts at trial, while thermite is an incendiary and pyrotechnic substance, it is not an explosive substance. T2/7. See United States v. Gelb, 700 F.2d 875, 879 (2d Cir. 1983) (holding uncontained gasoline not explosive as

defined in 18 U.S.C. § 844(j)). The primary or common of thermite is to burn like lava, not explode like a grenade. T2/7, 25. The experts made a consistent distinction between "explosive" substances and "combusti[ble]" substances like thermite. T2/98. Therefore, the regulatory scheme with its genesis in 527 Code Mass. Regs. § 13 does not apply to thermite. Nor can the Commonwealth supply its trial deficiencies by asking this Court to take judicial notice of the statutory and regulatory scheme, if any, applicable to thermite. See Commonwealth v. Green, 408 Mass. 48, 50 (1990) ("It is inappropriate to supply an essential element of proof by taking judicial notice of a fact at the appellate level.") Without showing the proper statutory and regulatory scheme that permits the possession of thermite, Mr. Aldana's conviction cannot stand.

III. THE DEFENDANT SHOULD HAVE BEEN CONVICTED OF ONLY ONE COUNT OF POSSESSING SUBSTANCES TO MAKE AN INCENDIARY DEVICE WHEN THE LEGISLATURE DID NOT INTEND THE UNIT OF PROSECUTION TO ENCOMPASS EACH INGREDIENT

While Mr. Aldana was convicted separately for possessing aluminum powder and possessing red iron oxide, the legislature did not intend to punish him

separately for each substance, material, article, explosive or ingredient which could be used to make a destructive or incendiary device. Double jeopardy prevents the Commonwealth from convicting or punishing a defendant twice for the same offense. Commonwealth v. Rabb, 431 Mass. 123, 126-27 (2000). In possession cases, the appropriate inquiry is what did the legislature intend as the unit of prosecution. Id. at 128; Commonwealth v. Rollins, 470 Mass. 66, 73 (2014). The defendant is entitled to the benefit of any ambiguity in the statute to the appropriate unit of prosecution. Rabb, 431 Mass. at 128.

In Rollins, 470 Mass. at 74-75, the SJC held that for purposes of the child pornography statute, the appropriate unit of prosecution was each identifiable cache of images, not each depiction itself. Previously, this Court held that the unit of prosecution for obscene films is the time and place where those films were found, not each individual film itself. Commonwealth v. Beacon Distribs., Inc., 14 Mass. App. Ct. 570, 574 (1982). In both cases, the courts pointed to the extremely high number of counts which could be generated each discrete item were a

separate charge and the potential of life sentences faced by the defendant in each instance by the multiplication of charges by sentences. Id. at 527; Rollins, 470 Mass. at 71-72.

For this statute, the consideration of each ingredient as a separate charge can lead to inconsistent results and very lengthy sentences. Thermite has only two ingredients, red iron oxide and aluminum powder. With a separate conviction for each substance, Mr. Aldana was facing a maximum sentence of twenty years. G. L. c. 266, § 102(a)(ii). Black power (gunpowder), for example, has three ingredients, charcoal, sulfur and potassium nitrate (saltpeter). A Molotov Cocktail typically has four parts, gasoline, motor oil, a wick and a glass bottle. The statute is clear that only one of the needed elements for any of these destructive items is sufficient if the intent to make a destructive item is present, but nothing therein can be read to exclude the plural from the singular. G. L. c. 4, § 6; see Rollins, 470 Mass. at 71 (holding singular tense in statute punishing possession of "a negative, slide, book, magazine, film, photograph or other similar visual reproduction" did not exclude

possession of multiple items). Every additional ingredient required for an incendiary or destructive substance necessarily adds five to ten years of sentencing exposure, but it does not necessarily follow that a Molotov Cocktail is more destructive or dangerous than thermite. Nor does the statute deal with quantity, so Mr. Aldana would still face more time even if he only had a small amount of the three chemicals to make black powder compared to the combined seven pounds of two chemicals he could have conceivably had to make thermite.

In Mr. Aldana's case, he was acquitted of the possession of an incendiary substance, G. L. c. 266, § 102A(c) but convicted of possessing components with the intent to make an incendiary substance, G. L. c. 266, § 102A(a)(i). The first charge identifies a completed crime because the mixture has been made into thermite and can be ignited into a destructive conflagration. The second and third charges essentially charge an attempt because the chemicals are not destructive or incendiary on their own. The first charge carries a more severe penalty, (ten to twenty years), over the second and third charges (five to ten years),

indicating that the legislature deemed the possession of the incendiary substance a more serious offense than the possession of the ingredients. See Commonwealth v. Hanson H., 464 Mass. 807, 810 (2013) ("[W]e look to the language of the entire statute, not just a single sentence, and attempt to interpret all of its terms 'harmoniously to effectuate the intent of the Legislature'.) However, if the substance requires three or more chemicals to make and the defendant has at least three of the chemicals, then as charged the defendant's sentencing exposure for possession with intent to make is greater than his sentencing exposure for the completed substance. See Flemings v. Contributory Retirement Appeal Bd., 431 Mass. 374, 375-376 (2000) ("If a sensible construction is available, [a court] shall not construe a statute to make a nullity of pertinent provisions or to produce absurd results.") Such a result is contrary to the tiered sentencing scheme the Legislature provided for in G. L. c. 266, § 102A. Rollins, 470 Mass. at 70.

In addition, the charge of possession with intent to make an incendiary substance is a lesser included offense of possession of an incendiary substance.

Commonwealth v. Aldrich, 88 Mass. App. Ct. 113, 118 (2015). In Kuklis v. Commonwealth, 361 Mass. 302, 307-08 (1972), the SJC held that possession of marijuana with intent to distribute was simply an aggravated charge of possession of marijuana and being present where marijuana was kept when the acts were performed with the "identical mass of a single drug". By contrast, in Commonwealth v. Diaz, 383 Mass. 73, 82-85 (1981) and Commonwealth v. Richardson, 37 Mass. App. Ct. 482, 489 (1994) distinct convictions of distribution and possession of the same controlled substance were not duplicative when based on the dealer's sale of the drug and the discovery of the dealer's stash elsewhere. In this case, both of the chemicals were found by the police in Mr. Aldana's kitchen in their factory-supplied bags and nowhere else, there exists no reason to depart from the single unit of prosecution rule.

Finally, the Courts have recognized that when the statute discusses a single criminal intent, multiple acts in furtherance of the crime do not constitute separate offenses. In Commonwealth v. Donovan, 395 Mass. 20, 29-30 (1985), the SJC held that the

Commonwealth had only proven one charge of larceny, even though multiple depositors had their money stolen, under the single scheme of posting a phony night deposit box on at a single place on a single evening. Multiple requests from a member of the Governor's Council for a bribe in exchange for his favorable vote on an item before the Council constitute a single scheme of solicitation and did not need to be charged separately for each request. Commonwealth v. Stasiun, 349 Mass. 38, 45-46 (1965). As in those cases, here Mr. Aldana was charged with the single intent of using red iron oxide and aluminum powder to make thermite and the experts were unable to identify any other incendiary or destructive substance which could be used with these two compounds.

When the Commonwealth prosecutes a possession offense with a single unit of prosecution in multiple counts, the proper remedy is to merge all the duplicative convictions into one conviction for sentencing purposes. Rollins, 470 Mass. at 75. In this case, while Mr. Aldana received concurrent sentences for his convictions, his record will still

show two distinct felony convictions. One of Mr. Aldana's convictions must be vacated. Id.

CONCLUSION

For the reasons stated in Argument I, the Court must sustain the defendant's appeal, reverse the judgment appealed from, order the suppression of the chemicals found inside the apartment, the observations and tests made therefrom and further order the Superior Court to dismiss the remaining charges in the indictments.

For the reasons stated in Argument II, the Court must sustain the defendant's appeal, reverse the judgment appealed from and order the Superior Court to enter not guilty verdicts on the remaining counts in the indictments.

For the reasons stated in Argument III, the Court must sustain the defendant's appeal, reverse the judgment appealed from and order the Superior Court to vacate one of the defendant's two remaining convictions.

Respectfully Submitted,
Defendant, by counsel:

/s/ Ethan C. Stiles

Ethan C. Stiles
P.O. Box 232
Plympton, MA 02367
ecstileslaw@gmail.com
Tel : (781) 312-7520
BBO #661083

August 12, 2016

CERTIFICATION OF COUNSEL
PURSUANT TO MASS. R. APP. P. 16 (K)

I hereby certify that the above document complies with the rules of this Court pertaining to the filing of briefs, including but not limited to: Mass. R. App. P. 16 (a) (6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16 (e) (reference to the record); Mass. R. App. 16 (f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16 (h) (length of briefs); Mass. R. App. P. 18 (appendix to briefs); and Mass. R. App. P. 20 (form of briefs, appendices, and other papers).

AFFIDAVIT OF FILING AND SERVICE

On or before August 12, 2016, I certify under the pains and penalties of perjury that I will have had two (2) copies of this Brief and Record Appendix served, by mail to the appellee and seven (7) copies filed with the Court.

/s/ Ethan C. Stiles
Ethan C. Stiles

ADDENDUM

Massachusetts General Laws

Chapter 4 - Statutes

§ 6. Rules for Construing Statutes.

In construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute:

First, The repeal of a statute shall not revive any previous statute, except in case of the repeal of a statute, after it has become law, by vote of the people upon its submission by referendum petition.

Second, The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for an offence committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

Third, Words and phrases shall be construed according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

Fourth, Words importing the singular number may extend and be applied to several persons or things, words importing the plural number may include the singular, and words of one gender may be construed to include the other gender and the neuter.

Fifth, Words purporting to give a joint authority to, or to direct any act by, three or more public officers or other persons shall be construed as giving such authority to, or directing such act by, a majority of such officers or persons.

Sixth, Wherever any writing is required to be sworn to or acknowledged, such oath or acknowledgment shall be taken before a justice of the peace or notary public, or such oath may be dispensed with if the writing required to be sworn to contains or is verified by a written declaration under the provisions of section one A of chapter two hundred and sixty-eight.

Seventh, Wherever action by more than a majority of a city council is required, action by the designated proportion of the members of each branch thereof, present and voting thereon, in a city in which the city council consists of two branches, or action by the designated proportion of the members thereof, present and voting thereon, in a city having a single legislative board, shall be a compliance with such requirement.

Eighth, Wherever publication is required in a newspaper published in a city or town, it shall be sufficient, when there is no newspaper published therein, if the publication is made in a newspaper with general circulation in such city or town. If a newspaper is not published in such city or town and there is no newspaper with general circulation in such city or town, it shall be sufficient if the publication is made in a newspaper published in the county where such city or town is situated. A newspaper which by its title page purports to be printed or published in such city, town or county, and which has a circulation therein, shall be deemed to have been published therein.

Ninth, Wherever a penalty or forfeiture is provided for a violation of law, it shall be for each such violation.

Tenth, Words purporting to give three or more public officers or other persons authority to adopt, amend or repeal rules and regulations for the regulation, government, management, control or administration of the affairs of a public or other body, board, commission or agency shall not be construed as authorizing the adoption of a rule or regulation relative to a quorum which would conflict with the

provisions of clause Fifth in the absence of express and specific mention therein to that effect.

Eleventh, The provisions of any statute shall be deemed severable, and if any part of any statute shall be adjudged unconstitutional or invalid, such judgment shall not affect other valid parts thereof.

Chapter 148 - Fire Prevention

§ 9. Rules and Regulations for Explosives.

The board shall make rules and regulations for the keeping, storage, use, manufacture, sale, handling, transportation or other disposition of gunpowder, dynamite, crude petroleum or any of its products, or explosive or inflammable fluids or compounds, tablets, torpedoes or any explosives of a like nature, or any other explosives, fireworks, firecrackers, or any substance having such properties that it may spontaneously, or acting under the influence of any contiguous substance, or of any chemical or physical agency, ignite, or inflame or generate inflammable or explosive vapors or gases to a dangerous extent, and may prescribe the location, materials and construction of buildings to be used for any of the said purposes. Such rules and regulations shall require persons keeping, storing, using, selling, manufacturing, handling or transporting dynamite or other high explosives to make reports to the department in such particulars and in such detail that the quantity and location thereof will always be a matter of authentic record in the department. Cities and towns may also make and enforce ordinances and by-laws, not inconsistent with said rules and regulations, relative to the subject matter of this section. Each city or town shall submit a copy of each such ordinance or by-law to the board within ten days after the passage thereof. Any ordinance or by-law regulating blasting operations, or the use, handling, transportation or storage of dynamite or gunpowder, shall not take effect until such ordinance or by-law is approved by the board, except that any such ordinance or by-law that has not been approved or disapproved by the board

within ninety days after the receipt thereof shall be deemed to have been approved.

§ 12. Manufacture of Fireworks or Firecrackers; License and Permit Required.

No building shall be used for the manufacturing of fireworks or firecrackers without a license from the local licensing authority. No building or structure shall be used for the manufacturing or storage of explosive materials without a permit issued by the marshal. Any person who has applied for or has been issued such a permit by the marshal, shall be deemed to have consented to periodic administrative inspections by the marshal or his designees of any building, structure, magazine or facility used to store such explosive materials or any records relating thereto. No person shall sell, transfer or exchange explosive materials within the commonwealth to any other person unless: (1) said transferee possesses the proper permit or certificate to possess, receive or store explosive materials; and (2) said transferee maintains, at the place of delivery, an approved, permitted, explosive storage magazine or bunker. Any information, data or record maintained by the marshal or his agents or designees, in any form, relative to the amount, location or nature of explosive material within the commonwealth, shall not be considered a public record, as defined in clause Twenty-sixth of section 7 of chapter 4. Such exception from the definition of "Public records" shall not preclude the release of such information to law enforcement personnel.

As used in this section, the words "explosive materials", "fireworks" and "firecrackers" shall be defined by the board pursuant to its authority as provided by section 9. The board shall promulgate regulations to carry out this section, including strict record keeping requirements. Any person who violates this section shall be punished by imprisonment in a house of correction for not more than 2½ years or by a fine of not more than $5,000, or by both such fine and imprisonment.

§ 13. License for Storage, Manufacture or Sale of Explosives; Removal of Hazardous Conditions upon Cessation of Use of Structure for Keeping Explosives; Revocation of Unexercised Licenses; Appeal by Person Aggrieved by Issuance of License.

No building or other structure shall, except as provided in section fourteen, be used for the keeping, storage, manufacture or sale of any of the articles named in section nine, unless the local licensing authority shall have granted a license to use the land on which such building or other structure is or is to be situated for the aforementioned uses, after a public hearing, notice of the time and place of which hearing shall have been given, at the expense of the applicant, by the clerk of the city or of the local licensing authority, by publication, not less than seven days prior thereto, in a newspaper published in the English language in the city or town wherein said land is situated, if there is any so published therein, otherwise in the county in which such city or town lies, and also by the applicant by registered mail, not less than seven days prior to such hearing, to all owners of real estate abutting on said land or directly opposite said land on any public or private street as they appear on the most recent local tax list at the time the application for such license is filed, and unless the application for such license shall have endorsed thereon the certificate of approval or disapproval of the head of the fire department. Such license shall be recorded in the office of the city or town clerk, and it shall, from the time of the granting thereof by the licensing authority, be deemed a grant attaching to the land described therein and as an incident of ownership thereof running with the land and shall not be deemed to be merely a personal privilege. Any license granted hereunder, or any license for the keeping, storage, manufacture or sale of any of the articles named in section nine, granted prior to July first, nineteen hundred and thirty-six, including any license reinstated and continued by the marshal as herein provided, shall remain in force unless and until revoked as hereinafter provided. Any such license granted hereunder shall be subject to such conditions and restrictions as may be prescribed in the license by

the local licensing authority, which may include a condition that the license be exercised to such extent and within such period as may be fixed by such authority.

The owner or occupant of said land licensed as herein provided, and the holder of any license for the keeping, storage, manufacture or sale of any of the articles named in section nine, granted prior to July first, nineteen hundred and thirty-six, including any license reinstated and continued by the marshal as herein provided, shall annually, on or before April thirtieth, file with the clerk of the city or town where such license is to be or has been exercised, or in Boston, with the fire commissioner, or in Cambridge, with the board of license commissioners, a certificate of registration setting forth the name and address of the holder of such license; provided, that no certificate of registration shall be required for any building used as a garage for storing not more than three vehicles, when once used under such a license. The board may by regulation prescribe the amount of any of the articles named in section nine that may be kept in a building or other structure without a license and registration, or either of them. Such fee as may be established from time to time by ordinance or by-law may be charged for any such license, registration or certificate of the head of the fire department, respectively.

Every license granted under this section, and every certificate of registration filed under this section, shall be deemed to be granted or filed upon condition that if the land described in the license ceases to be used for the aforementioned uses, the holder of the license shall within three weeks after such cessation eliminate, in accordance with rules and regulations of the board, all hazardous conditions incident to such cessation. If the holder of the license fails so to eliminate such conditions, the local licensing authority may eliminate such conditions; and a claim for the expense incurred by the local licensing authority in so doing shall constitute a debt due the city or town upon the completion of the work and the rendering of an account therefor to the holder of the